IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION
Civ. No. B 038975
(Super. Crt. No. C420153)

CHURCH OF SCIENTOLOGY
and MARY SUE HUBBARD

Appellants,

-against-

GERALD ARMSTRONG,

Defendant.

Appeal from Superior Court of California
County of Los Angeles
Judge Bruce R. Geernaert

RESPONDENT'S BRIEF
and
CROSS APPEAL BRIEF

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Exhibit Y.	Reporter's Transcript of Proceedings, Wednesday, November 30, 1988
Exhibit Z.	Court Order, December 17, 1986
Exhibit AA.	Order, December 12, 1986

In 1982, Gerald Armstrong, who had been a Scientologist for twelve years, was declared to be a "suppressive person" (an enemy of the Church of Scientology) which would allow him to be subject to Scientology's fair game policy. Under that policy, he could be "injured by any means by any Scientologist...[and] tricked, sued, lied to and destroyed." See Appendix to the Memorandum of Intended Decision (herein Memo Decision Appendix), Exh. C to Appellant's Appendix at page 1, 13.[1]

According to Judge Breckenridge's decision, Armstrong believed that the only way he could protect himself from both physical and other fair game tactics, was to take certain archive documents regarding the life of or written by L. Ron Hubbard, the founder of Scientology, to which Armstrong had access as Hubbard's archivist, and deliver them to his attorney (see Memorandum of Intended Decision pp 4-5).

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[1] Fair game has been recently confirmed as a Scientology policy under which the enemy, including ex-adherents, may be harassed and abused, attacked to the point of being stripped of economic and psychological power. Wollersheim v. Church of Scientology of California (2d District 1989) 260 CR 331. It has been found by courts of this state to include the making of false accusations of criminal acts with the intent that the enemy be unjustly arrested and imprisoned. See Allard v. Church of Scientology (1979) 58 Cal.App.3d 439, 434. It has led to eleven top Scientologists going to prison for a massive campaign to obstruct justice United States v. Heldt, 668 F.2d 1238 (1981) and has been a factor in Scientology losing its tax-exempt status. Church of Scientology of Calfornia v. Commissioner of Internal Revenue, (Att. Cir. 1987) 823 F.2d 1310.

See also Memorandum of Intended Decision Appendix C and D. Scientology violates and abuses member's rights with "Fair Game."

"The organization clearly is schizophrenic and paranoid, and this bizarre combination seems to be a reflection of its founder L. Ron Hubbard. The evidence portrays a man who has been virtually a pathological liar (p. 8)."

This lawsuit commenced as a conversion action for the return of the archive documents and for damages. It was brought by the Church of Scientology of California which claimed to be bailee of the documents by assignment from L. Ron Hubbard. Hubbard himself, although alive at the time, did not join in the action to seek vindication of any privacy interest in the documents. His wife, Mary Sue Hubbard, intervened to assert her interests in the small percentage of the Archive that was pertinent to her. Armstrong cross-claimed raising a variety of claims rooted in Scientology's fair game policies and its fraudulent recruitment tactics.

The Hubbard documents were ordered to be deposited with the clerk under seal where they remained throughout the lawsuit (See Appellants' Brief at 2). They are no longer within the court files having been returned to the Church of Scientology of California in 1987 (see Stipulated Sealing Order para. 1.A, Appellants' Appendix Exh. E).

Appellants' claims were tried to Judge Breckenridge sitting without a jury in May of 1984. During the trial "a small percentage of the thousands of documents held under seal by the clerk" were admitted into evidence. Appellants' Brief 3. Although he found that Appellants had made out a prima facie case of conversion against Armstrong, Judge Breckenridge also held that Armstrong's actions were privileged as a means of self-protection he reasonably believed was necessary. Therefore he held for Defendant Armstrong on all claims (App. C and D).

Prior to the trial on the cross-complaint, the parties entered into a settlement agreement (see App. E). Despite the same, Armstrong's Appellants have appealed their denial of their action, apparently to avoid the collateral estoppel effect even though the case has been settled. The court ordered the settlement agreement to be filed with the court but the same was not (see App. 2, Exh. AA). The file was sealed pursuant to settlement terms and stipulated sealing order; no findings to justify same were made by the court (see Transcript of Proceedings of December 11, 1986, TR 6 lines 17-28 through TR 7 line 27; Exh. A to Exh. J of the App. at p. 2, lines 16- 23, p. 6, line 17, p. 7, line 26).

In October of 1988, Bent Corydon respondent herein, moved the trial court to unseal the Armstrong court file. As a litigant in several lawsuits against appellant Church of Scientology of California and other Scientology entities, he argued that the Armstrong ruling might collaterally estop Scientology from making certain contentions in those actions.[2]

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[2] Corydon has been sued in three separate defamation actions. Scientology President Heber Jentzsch has sued Corydon for claiming that Jentzsch lied pursuant to Scientology policies, Jentzsch v. Corydon, NVC 14274 (appendix H, Exh. D). John Carmichael has filed an action identical to Jentzsch. Carmichael v. Corydon, 189414 (appendix H, Exh. D). Church of Scientology, International filed a defamation action against Mr. Corydon in the District of Columbia, CA 8048-87 alleging it was defamed by Corydon's statements that Scientologists had harassed him by sending an individual into his building who stuck an employee and by personally intimidating Mr. Corydon (appendix K, Exh. D). Church of Scientology has sued Corydon for various causes of actions in County of Riverside, Church of Scientology, Riverside v. Corydon, 154129 (appendix I, Exh. A). Corydon has filed his own action against the Church of Scientology, Corydon v. Church

Corydon further maintained that the documentary evidence on which Judge Breckenridge relied in finding that the fair game policy existed would be essential in other litigation, as well as evidence that would prove allegations he stated to the media over which he is now being sued for defamation.

Judge Bruce Geernaert, sitting instead of Judge Breckenridge who had since retired, found that the court files were sealed **"only because the parties asked...there are no grounds for having that be sealed or secret from view at all."** TR at 10; Exh. A to Exh. J of App. p. 53. Accordingly, he opened the entire Armstrong file to the public at large including evidentiary documents that had been sealed by the court, and not returned to Scientology with the others. Upon reconsideration he ordered the evidentiary archive documents to be retained under seal under an unusual order that is subject of the cross-appeal. All the other evidentiary documents (including the exhibits introduced at trial) have been returned to Scientology by the clerk. Pursuant to Appellants' writ, Judge Geernaert's order was modified pending this appeal to permit only Corydon, his counsel, and the parties to the underlying lawsuit and their counsel to see the files.

Corydon has now examined the contents of the Armstrong file. However, in light of the interim order, he and his counsel are under the threat of contempt proceedings should they disclosed

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of Scientology, International, Inc. C 694401 (appendix I, Exh. C)alleging defamation, interference with economic advantage, intentional infliction of emotional distress, etc.

the contents of the file or if they use any of those documents in other pending litigation but fail to ask that the documents be sealed. Accordingly, Corydon seeks affirmance of the trial court's decision and relief from the unwarranted protective order currently in place. Further, in the light of Scientology's litigious history,[3] Corydon desires free access to the file for his own future protection, as well as the public's.

In the cross-appeal, he further seeks to view the only remaining "exhibits" in the file, a right which the trial court has denied him (App. O).

ARGUMENT

I.
PRIOR TO ISSUING THE SEALING ORDER THE TRIAL COURT FAILED TO CONDUCT AN INQUIRY INTO WHETHER ANY COMPELLING NEED HAD BEEN SHOWN THAT WARRANTED SEALING

A cursory review of the Appellants' brief suggests the existence of two "facts" that are not supported by the record. First, it suggests that the sealing order took place in the context of the following scenario: on December 11, 1986, the parties approached Judge Breckenridge with a potential settlement agreement which required his granting a sealing order in order to protect Appellants' privacy interests. Appellants' brief further

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[3] See footnotes 1 & 2. In Church of Scientology v. Siegelman 475 F.Supp. 950, the decision begins:

"In this latest libel action brought by the plaintiffs, two branches of the litigious Church of Scientology..."

Footnote 1 quoted a lexis scan providing thirty reported cases in which the Church of Scientology was a party. Ten years has passed since this decision and any additional lexis scan would again reveal countless Scientology litigation in the last decade.

suggests that Judge Breckenridge reviewed the settlement agreement, that he deliberated on the question of whether there were, in fact, privacy interests that would be protected by sealing the Armstrong file, that these privacy interests warranted sealing presumptively public documents, and, that he made a considered judgment that sealing the court file was warranted in order to facilitate the settlement. Nothing is further from the truth.

A detailed review of the transcript of December 11, 1986 reveals that when presented with the proposed sealing order, Judge Breckenridge was incredulous. The entire relevant portion of the transcript is as follows:

> THE COURT: What is this -- under this stipulated sealing order paragraph 2 provides that the entire remaining records of this case, save only this order, the order of dismissal of the case, and then the order necessary to effectuate this order and the order of dismissal, are agreed to be placed under seal of the court.
>
> What is it that you have in mind, the file itself?
>
> MR. HERTZBERG: Yes, Your Honor. That is the procedure that the Church has insisted on and all courts have agreed to in various other Scientology cases involving Mr. Flynn and others which have been settled.

MR. FLYNN: We settled, Your Honor, several cases in the federal district court in Tampa, Florida and recently six cases in the federal district court in Los Angeles.

THE COURT: I just want to know what is contemplated so the clerk won't be running around and --

MR. FLYNN: I'd say the entire record, I mean the court file.

THE COURT: There was a reporter's transcript. There was an original and copies prepared.

Of course, those went to the court of appeal.

MR. FLYNN: Whatever is in the physical possession of the court --

THE COURT: I guess we are talking just basically this multiple set of files will be placed under some kind of seal.

MR. HERTZBERG: Your Honor, presumably any materials that come form the court of appeal would then be integrated under that seal.

THE COURT: Yes. That would be understood.

Of course, there have been innumerable people in the interim who have come forward and examined the file. I haven't the slightest idea who all those people are, but certainly we can't go back and retract from them whatever they have seen or observed or copied.

MR. HERTZBERG: We understand, Your Honor.

THE COURT: All right. Then, the court will sign the respective orders. Is that all?"

TR 6, line 17 through TR 7 line 27; Appellants' Exh. J, at Exh. A thereto, p. 6, line 17 through p. 7, line 27.

The transcript reveals that the sealing was not requested to protect privacy interests and nor did Judge Breckenridge carefully exercise discretion in the matter. The sole purpose stated on the record for the sealing of the file was, put simply, "That is the procedure that the Church (insisted) on and all courts have agreed to in various other cases involving Mr. Flynn [Armstrong's attorney]." Not only was there no mention whatever that the sealing was necessary to protect any privacy interests, but to the contrary, the only reason for the sealing, expressly stated, was that this was how Scientology

wants it.

This was noted by Judge Geernaert. Attached as Appendix W (Respondent's App.)[4] is a transcript of the hearing on November 9, 1988 ruling on the motion to unseal the file. Therein Judge Geernaert noted that the case was sealed in connection with the settlement and therefore is subject to being unsealed on the request of any reasonably interested party. "That's the requirement of our public policy and law (TR 9; App. W, p. 1, lines 23-24)." Judge Geernaert further noted the case was only sealed because the parties "asked." He stated, **"There are no grounds for having that be sealed or secret from view at all (TR 11; App. W, p. 3, lines 10-11)."** Judge Geernaert even stated that he had spoken to Judge Breckenridge who advised that he had sealed the case only pursuant to the settlement and that otherwise he would have no interest in sealing his decision or the file.

Scientology attorney, Mr. Hertzberg, then changed directions and argued that the sealing order "was an essential element that we bargained for..." To this Judge Geernaert responded "you can't bargain with a judge and I'm confident that Judge Breckenridge did not intend that type of order that you are describing (p. 11, lines 17-22)."

The second "fact" that is not supported by the record is the assertion that the Appellants' have any privacy interest in

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[4] Appellants made no attempt to confer in making their appendix as requested by Rule 5.1. To avoid confusion Respondent's appendix lettering begins where Appellants' ends.

the Armstrong files at all for, although throughout Appellants' brief reference is made to the need for protection of the Appellants' "privacy interests," **they have not demonstrated (a) that any information warranting protection under California's privacy laws is in the Armstrong court files, and/or (b) that, if so, it is their personal right which is being asserted.** This conclusion follows from the simple fact that this lawsuit revolved around the archive papers of L. Ron Hubbard, Memo Decision, Appellants' Appendix (Exh. C at 2-3), but he is deceased and his right of privacy in those documents died with him.

More importantly, the record is devoid of any arguments or evidence as to what documents could invade a privacy interest, or how the same could occur. As stated above, the only thing that was ever stated to the court was that the sealing order was a part of the "bargained for" settlement.

In this regard, the law is stated in Fong v. Miller, 105 Cal.App.2d 411:

> **"Appellants bitterly complain that the court's action leaves the respondent unjustly enriched. The complaint is a familiar one, it is generally made by those who, deeming themselves wronged by their companions in illegal ventures, find themselves denied of any right to enforce their unlawful agreements. Their pleas have always been unavailing. This rule is not generally applied to secure justice between parties who have made an illegal contract, but from regard for a higher interest - that of the public, whose welfare demands that certain transactions be discouraged." Id at 414-415.**

II.
NO PROPER CLAIM OF PRIVACY WAS ASSERTED BEFORE THE TRIAL COURT

A claim based on an invasion of privacy is a purely personal claim; it cannot be asserted by any one other than the person whose right of privacy has been invaded. Flynn v. Higham (1983) 149 Cal.App.3d 1463, 232 Cal.Rptr. 668. It does not survive but dies with the person whose privacy has been invaded.[5] Accordingly, neither the Church of Scientology of California (CSC) nor Mary Sue Hubbard can assert L. Ron Hubbard's rights of privacy in the archive documents or any information taken from them. Mrs. Hubbard failed to establish below that any of the "small percentage" of the documents that found their way into the pleadings or trial transcript were personal papers of her own rather than those of her deceased husband. Indeed, given the present record on this appeal, there is no basis to conclude that any such documents were hers or that, if they referred to her at all, that they did so more than incidentally. She has no privacy right in either case. As Hendrickson v. CA Newspaper Inc. 48 Cal.App.3d 59 states:

> **Where the plaintiff's only relation to the asserted [privacy interests] is that of a relative of the [person whose rights were invaded] and was unwillingly brought into the limelight, no recovery can be had."**
> 48 Cal.App.3d at 62

As for CSC, it should be noted that CSC's claim was not one for

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[5] To the extent that Scientology might argue privacy of its members collectively, such invasion potential does not appear in the record, nor was any evidence of such potential harm presented to the court.

privacy but for conversion of documents it held as bailee and it has no privacy interests in Hubbard's papers.

If any of the documents that were admitted into evidence during the Armstrong trial impinged upon Mrs. Hubbard's privacy interests, why have the Appellants not sought to file such with the court, under seal, and/or pointed to that portion of the trial transcript in which that private information was read into the record so that the legitimacy of those interests can be evaluated?

To ask this question is to answer it. The question assumes that the alleged privacy interests exist whereas the transcript of December 11, 1986 clearly demonstrates that the sealing of the file was not motivated by such interest but by the Church's desire to shield itself from public scrutiny. Even if there had been some privacy interest, it is outweighed by public's need to know concerning controversial Church of Scientology.[6]

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[6] Many courts have noted the controversial nature of the Church of Scientology. In Siegelman, (supra), it was called a **"controversial religious movement, which is a public figure."** (at 955-956); it was further noted as controversial and accused of crimes in Church of Scientology of California v. Cazares, 638 F.2d 1727 (5th Cir. 1981). See also Church of Scientology of California v. Commissioner of Internal Revenue, supra; United States v. Heldt, supra; Judge Breckenridge's decision, appendix C.

The various exhibit documents in question have already found their was from this court file into the book Bare-faced Messiah: The True Story of L. Ron Hubbard by Russell Miller. As it was noted by Judge Breckenridge when he granted the sealing order pursuant to the stipulation "of course, there have been innumerable people in the interim who have come forward and examined the file. I haven't the slightest idea who all of those people are, but certainly we can't go back and

III.
SINCE THE RECORD IS DEVOID OF ANY COMPELLING NEED WARRANTING SEALING A PRESUMPTIVELY PUBLIC FILE, THE RECORD SHOULD BE UNSEALED

In the face of the rapid increase in the last decade of routine sealing requests as a condition of settlements, several California Courts of Appeal, including this one, have rejected that practice. See e.g. Champion v. Superior Court, (1988) 201 Cal.App.3d 777, 785,788; 247 Cal.Rptr. 624, 628, 630 ("**However appealing it may be to merely accept a stipulation by the**

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retract from them whatever they have seen or observed or copied."

Apparently author Russell Miller was one of those persons and used the same in his book. Scientology then tried to stop the publication of the book based upon a claim of copyright in said archive materials. In New Era Publications International v. Henry Holt & Co. Inc., 83 Civ.3126 (PNR) filed in the U.S. Dist. Court of New York, the court, in denying a Scientology injunction motion, noted the possible existence of a copyright interest. The court took notice that Scientology had filed numerous lawsuits in various countries against the author attempting to stop the book's distribution. The court stated: "**The British courts concluded the litigation was instituted to stifle criticism and not to protect any legitimate interest of the Church in preserving confidentiality (p. 3).**"

Scientology's argument for an injunction was that Hubbard's writings were extensively quoted without permission. The court took notice that the public has a strong interest concerning these documents, and that "Hubbard is a figure of great public importance for the great wealth accumulated and the influence he wielded through his writings and religion. During his life he actively sought publicity (p. 25)." The court acknowledged that the London Sunday Times wrote that Russell Miller "had done a service to his readers by surmounting the legal obstacles placed in his way by the Scientologists who attempted to discredit him and prevent the publication of his book...(p. 26)."

The court found that evidence of Hubbard's cruelty, disloyalty, aggressiveness, vicious and scheming tactics, matters of public concern (pp 45-56).

We are providing this court with a copy of said opinion as our appendix X.

parties to seal a record, the temptation must be resisted"[7]; Pantos v. City and County of San Francisco (1984) 151 Cal.App.3d 258, 262 - 263, 198 Cal.Rptr. 489; Mary R. v. B. & R. Corp. (1983) 149 Cal. App.3d 308, 196 Cal.Rptr. 871; Estate of Hearst (2d dist., 1977) 67 Cal.App.3d 777, 136 Cal.Rtpr. 821.

In Pantos, the Court of Appeal succinctly stated the California position:

> **"The law favors maximum public access to judicial proceedings and court records [citations omitted]. Judicial records are historically and presumptively open to the public and there is an important right to access which should not be closed except for compelling countervailing reasons." Pantos, supra, 151 Cal.App.3d at 262-263, 198 Cal.Rptr. 489 (Emphasis added).**

However, it was the Hearst case, supra, that led the way.

In that case the probate court vacated a prior order permanently sealing certain files, "under the misapprehension that it had no power to deny public access." 67 Cal.App.3d at 784, 136 Cal.Rptr. at 815. Thereafter the trustees of the

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[7] In Champion, parties sent the court a letter stating documents contained information of highly confidential nature and subject of confidential settlement agreement (at 786). None of the parties explained why it had such status. The court noted the law favors maximum public access and judicial records are historically and presumptively open to the public. "We believe it is literally improper, even on stipulation of the parties, for the court to issue an order designed not to preserve the integrity and efficiency of the administration of justice, but to subvert public policy (at 788)." The court noted that a request to seal documents must be specific as to each such document, and supported by a factual declaration of need. The request to seal must remain public.

Hearst Testamentary Trust petitioned for a writ of mandate to correct the lower court's action. Although the court of appeal criticized the lower court's analysis it upheld the result finding that the court has

> **"limited power, exercisable under exceptional circumstances and on a showing of good cause, to restrict public access to portions of court records on a temporary basis." Id.[8]**

In the Hearst case, a strong argument had been presented to the court that, in light of the recent victimization of the Hearst family by terrorists, the family needed the court's assistance to assure its safety through sealing of the records showing the current surnames and addresses of various beneficiaries. Nevertheless the Court of Appeal did not believe that concern merited the permanent sealing of the entire court files:

> **"Cases such as Craemer and Rosato establish that on a sufficiently strong showing of necessity, the court has a right to limit access to its records for temporary period (footnote omitted). When, as here, relief sought extends to sealing of permanent court records and denial of access to court orders, rather than temporary limitation of access to sealing to evidentiary transcripts the trial court must be careful to limit its denial of access by narrow well-defined orders."**
> 67 Cal.App.3d at 785, 136 Cal.Rptr. at 825.

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[8] Appellants' citations to Hearst misleadingly suggest that it supports their position. Although language in the Second District's opinion criticized the lower court for its "misapprehension" regarding its authority to seal court files, it went on to deny the petition for mandate court's vacatur of the sealing order and provided the strongest basis for maintaining the Armstrong files open. It is on all fours with this appeal. Indeed, the transcript of the applicable present case supports the vacatur herein.

Appellants will try in vain to show that these standards were met. Indeed as the transcript of the applicable hearing made clear, there was no attempt to demonstrate to the trial court that any "strong showing of necessity" existed warranting sealing the entire file even on a temporary basis, nor was there any attempt to balance public and private interests through "narrow well-defined orders." Indeed, where the only basis for sealing the file was that the parties wanted it, it follows that such a sealing order must be vacated. See Champion, supra.

The Hearst decision has led to other rulings which have further delineated the public policy reasons against sealing court records.

In Mary R. v B. & R. Corp., supra, the Division of Medical Quality Assurance's efforts to investigate a physician's conduct were blocked by a "stipulated gag order" in a civil case arising from an alleged molestation of his minor female patient. The victim asserted she could not discuss the case with the Division under that order. When the Division's motion to intervene in that case to set aside the gag order was denied, it appealed. The court of appeal held that the Division had standing to collaterally attack the gag order and further held:

> **"We believe it clearly improper, even on the stipulation of parties, for the court to issue an order designed not to preserve the integrity and efficiency of the administration of justice but to subvert public policy."**
> 149 Cal.App.3d at 316

Then, relying on Hearst, the court added:

> **"(S)ince court records are public records, the burden rests on the party seeking to deny public access to those records to establish compelling reasons why and to what extent these records should be made private." Id.** at 317, 196 Cal.Rptr. 871.[9]

In contrast to this standard, the record herein is devoid of any "compelling reasons" warranting the sealing of the file. The mere assertion of the parties that they wish the file to be sealed does not address this standard. As the 1st District Court of Appeal stated in Champion:

> **"...however appealing it may be (for courts) to merely accept a stipulation of the parties to seal a record, the temptation must be resisted. Champion v. Superior Court,** 201 Cal.App.3d at 787, 247 Cal.Rptr 630 (emphasis added)

Indeed, assuming arguendo that Appellants' late assertion of privacy interests should be given attention, Appellants' argument is still without merit since, as demonstrated in Section I, supra, no privacy interest in the Armstrong court files has demonstrated. In fact, it was simply never raised before the trial court at the time the order was made.

IV.
THE COURT PROPERLY BALANCED THE PUBLIC'S GENERALIZED RIGHT OF ACCESS AGAINST THE PARTIES' RELIANCE INTEREST IN CONTINUED SEALING

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[9] While Mary R. involved obstruction of a public agency's investigation of misconduct pursuant to its public authority, and the present case is a matter of private litigation, the Champion court's reliance on Mary R. demonstrates that it is a distinction without a difference. Further, litigation is state action, and litigants have the same right to access as does a public agency.

Appellants' claim that the case of United States v. Hubbard (D.C. Cir. 1980) 650 F.2d 293, demonstrates that "reliance on a generalized public right of access" is an inappropriate basis to premise unsealing. However, that case has no bearing on the current issue.

Hubbard, was a criminal proceeding in which defendants (including the same Mary Sue Hubbard who appeals herein), filed a motion to suppress evidence, specifically, over 50,000 documents seized by the FBI pursuant to a search warrant, on the ground of unlawful search and seizure. Apart from use in the suppression hearing itself, the documents were never made part of a public trial because appellant Hubbard pleaded guilty. Thus, the privacy interest which the appellant sought in that action to protect was the Fourth Amendment right to be free from government intrusions upon a zone of privacy. See Katz v. United States (1967) 389 U.S. 347, 350-351. In contrast, the present case involves California law regarding public access to court records and the assertion of undemonstrated privacy interests in those records. The correct balancing has been determined in Hearst, supra. and its progeny. The historic and presumptive right of public access is not to be disturbed absent the proponents' proof of compelling countervailing reasons. Pantos, supra; Mary R. supra.

Appellants also try to argue that, whatever the merits of the original sealing order, a sealing order entered into in

connection with a settlement agreement should not be disturbed on appeal because of the judicial policy to encourage settlements. Appellants' Brief 16-19. In so doing they ignore the case law in section II, supra in which California Courts have recently joined the trend against such routine orders. In fact, in Mary R., the appellate courts gave no merit to the issue of whether the unsealing would undo the parties' expectations. Thus, under California precedent, there is no consideration of the parties expectations once it is found that the sealing was not warranted.

A variation of this rule occurred in Champion. Specifically, that case dealt with the procedure to be used in requesting that documents filed with the court of appeal be sealed. After examining the affects of the absence of an appellate procedure on this subject, the court cited Hearst, Mary R., and Pantos all supra, and held:

> **"We must be vigilant to ensure that nothing presented to the court is sealed without a strong justification."**
> 201 Cal.App.3d at 788, 247 Cal.Rptr. 630.

Appellants cite Champion as standing for the proposition that the appellate court should be guided in these matters by the parties' choice. Appellants quoted from the decision the following:

> **"We granted the requests to seal, influenced by the parties' agreement to the procedure and by the lower court's sealing of the records..."**

However, this quote, taken out of context as it is, is misleading as to the inference to made therefrom since the

court clearly ruled against such practice and proceeded in that case to set the standard for dealing with such requests in the future.[10]

Finally, Appellants cite FDIC v. Ernst & Ernst (2d Cir. 1982) 677 F.2d 230, for the proposition that a prerequisite to unsealing court files that had been sealed pursuant to a settlement is the finding of a "compelling need" or "an extraordinary circumstance." However, that case only involved the question of whether the terms of a settlement agreement which had been placed under seal would be unsealed and, therefore, it is not pertinent to the matter at bar. The settlement agreement has never been filed. See Respondents Appendix Exh.'s A and D. Nor is this case California Law.

In summary, there is no impediment to Judge Geernaert's decision arising from the parties' erroneous expectation that the file should be sealed as a function of their request.

V.
JUDGE GEERNAERT'S DECISION UNSEALING THE ENTIRE FILE TO THE PUBLIC AT LARGE WAS SOUND AND SHOULD NOT BE OVERTURNED

In contrast to Judge Geernaert's unsealing, Appellants describe with approval how the court conducted a document by document review of the Hubbard archive documents to determine whether certain items subpoenaed by the FBI and the IRS should be produced to them. But what Appellants fail to point out is

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[10] The court merely ruled it would be confusing at that time to remand the case for further proceeding consistent with its ruling.

even more instructive: those document by document evaluations occurred as to the Hubbard archive documents themselves, not the entire file, and the issues in those matters was whether the subpoenaed documents were relevant to the respective governmental investigations and/or subject to a privilege (not a privacy interest) such as the priest-penitent or attorney-client privileges. See Appellants' Brief at 27-29. In this regard, Scientology was overruled. See United States v Zolin, 809 F.2d 14[11]. Thus, unlike the two instances cited by Appellants in which the FBI and IRS succeeded in establishing a right of access to particular documents, the right of access to the Armstrong files is presumed: Appellants had the burden of proving by compelling need the basis for sealing the files on a narrowly-defined, document by document basis. Accordingly, Appellants' citations to United States v. Zolin (1989) - U.S., - 109 S.Ct. 2619, and Founding Church of Scientology v. Director, Federal Bureau of Investigation Civ. No. 78-0107 (D.D.C.) are inapposite to the issues herein.

Appellants lament that the opening of the file is a gratuitous invasion of their rights. However they ignore the

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[11] In Zolin, the IRS initiated an action to compel production of thirteen sealed documents. At no time did the court indicate that the sealing court created any bar to the production, rather the issue was whether or not the documents were privileged. Five were released, and the others were ruled either irrelevant or privileged. As to one document that was held subject to the attorney client privilege, the United States Supreme Court has since issued directions on remand for determining that issue. United States v. Zolin, 109 Supreme Court 2619.

very foundation of Judge Geernaert's decision. That is, (1) that there was no finding by Judge Breckenridge that there was a "compelling need" for which permanent sealing was warranted, see Hearst, supra, 67 Cal.App.3d at 785, and (2) that they bore the burden of establishing the need, if any, for sealing the record and for defining narrowly the documents which merited that concern. Mary R., 149 Cal.App.3d at 317 ("the burden rests on the party seeking to deny public access...to establish compelling reasons...").

Granting that Judge Geernaert fully examined the papers before him, including the transcript of December 11, 1986, it was with this absence of any reasoning in mind that he observed that there are "no grounds for having that be sealed or secret from view at all (TR 11; App. W, p. 3, line 10-11)."

After putting these facts in sound perspective, the case law cited by Appellants supports Judge Geernaert's decision one hundred percent. Appellants did not meet their burden of establishing a basis for the sealing of the Armstrong file and have not cured that failure by their belated claim that their privacy rights demand sealing.

VI.
THE COURT CANNOT SEAL A FILE ONCE OPENED TO THE PUBLIC

At the time that Judge Breckenridge issued his sealing order pursuant to the settlement agreement, Judge Breckenridge noted that there have been **"innumerable people in the interim who have come forward and examined the file (TR 7; App. J, Exh.**

A, p. 5)." [12]

It is clearly the law in California that once documents have been opened to the public, they cannot thereafter be resealed without violating the first amendment. This was clearly the law set forth in Coalition Against Police Abuse v. Superior Court, (1985) 170 Cal.App.3d 88. Therein, at the conclusion of the case, the court ordered a sealing of documents. On appeal it was held that to the extent that documents produced or ever made available to the public were included, the same had to be reversed. Once a document has been made public, any retroactive sealing of the same would violate the first amendment.

On this ground alone, the Judge Breckenridge order was error.

VII.
PUBLIC POLICY REQUIRES DISCLOSURE

As set forth above, perhaps most clearly in footnotes 1 & 6, the Church of Scientology has long been a controversial organization, even one that has been involved in crimes and obstruction of justice. Its status of religion has even been debated. Most recently, its practice of "Fair Game," one who is enemy of the organization "may be tricked, sued, lied to or destroyed." -- and its "billion year contracts." -- one who leaves the organization must pay money -- have been affirmed and criticized by this Court and those practices soundly

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[12] Many of these documents made their way into a published book. See discussion of New Era, footnote 6.

decried. Wollersheim,(2d Dist. 1989) 260 Cal.App.3d 331.

When documents relate to matters of public interest, protective orders seeking to conceal said documents generally are denied. Gill v. Hearst Publishing Co. (1953) 40 Cal.2d 224, 228, 253 P.2d 491 (the right of privacy cannot be extended to prohibit disclosure of newsworthy matter or matter of public interest); Krause v. Rhoads, 671 F.2d 212 (National Guard shooting at Kent State).

VIII.
CONCLUSION

Court files are open to the public except when, under compelling circumstances, a court determines sealing is warranted. If permanent sealing is sought, California law also demands that the order must be narrowly drawn only as to those parts of the file to which the compelling need applies.

In the present case the files were sealed without any demonstrated compelling need, and, even though Appellants claim the order was intended to be permanent, it was a blanket order as to the entire file. Yet no consideration was given by the court as to whether, under all the facts and circumstances, any interest warranted this obstruction of a very basic principle of public access.

The belated claim of privacy smacks of fabrication. Neither the Church of Scientology of California nor Mary Sue Hubbard have any privacy claim in the personal papers of Hubbard. Thus, the only possible privacy interest in the Armstrong file may be stated as follows: if any of the small

percentage of the Hubbard archive which were personal documents of Mary Sue Hubbard were among the small percentage of the entire archive that made their way into the evidence, there is a minimal possibility that her privacy interests might warrant sealing those specific documents even though they were admitted into evidence in public trial. Yet on this hypothetical basis Mary Sue Hubbard asks this court to seal, this entire file permanently even though she has not demonstrated that any of the file contains such private matters! And, this argument was never made to the trial court when the order was made: the only basis for sealing offered at that time was a statement that it was pursuant to the settlement.

During his life Hubbard was a high pitch salesman of his personality and his ideas. The Church has continued to use glossy tactics to sell his image since his death. Countless newspapers and billboards carry his picture and promote him as a guru of mental health. The public has a right to know about such a person.[13] The Armstrong file may contain a few fragments out of the vast number of documents which comprise the personal archive of L. Ron Hubbard. If some unpleasant details about him are revealed in this file, they have no claim. Certainly, that possibility does not justify the extreme action demanded by Appellants herein.[14]

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[13] See New Era Publications and Gill supra, footnote 6.

[14] In Jentzsch v. Corydon NVC 14274 a defense issue for Corydon to prove is that Plaintiff Heber Jentzsch lies pursuant to Scientology policies. Before the court was the fact that

The file should not have been sealed and this court should affirm the unsealing order.

Mr. Jentzsch had done a magazine article giving the false Scientology history of L. Ron Hubbard. Thus, documents relating to L. Ron Hubbard's true life history are relevant to Mr. Corydon's defense. That these documents do prove the Scientology history of Mr. Hubbard to be false was noted in New Era, supra. In addition, it was shown to the court that Plaintiff Jentzsch had referred to Judge Breckenridge's decision (appendix C and D) as being Nazi influenced (appendix H, Exh. A).

CROSS APPEAL

Following the order of Judge Geernaert lifting of the sealing order, appellants move for reconsideration concerning six pieces of evidence within the court file (App. L). This motion was granted, the court ruling it did not require the unsealing of exhibits in the 500 series (audio tapes) nor to an additional five designated documents. With regard the last five documents, the court stated that it was without prejudice to a further motion specifically directed to these documents in connection with discovery in the other cases (App. Q).

The minute order itself does not explain the court's ruling.

The transcript of November 30, 1988 (TR 21-35; App. Y) sets forth Judge Geernaert's reasoning in denying access. First the court made an order that Exh. 500-5C were not intended to be part of his original order as that matter was now the subject of other litigation pending in front of the United States Supreme Court (Zolin, supra) (TR 22; App. Y, p. 2, lines 6-10). As to the other five documents, the court asked the question as to why these documents should not be unsealed (TR 25; App. Y, p. 5).

The court noted that the five documents are not "privileged." (TR 26-28; App. Y, pp 6-8).

The court asked: "Realistically, how are they going to determine whether they are relevant (the five documents) unless they are unsealed (TR 29 p. 9, lines 7-9)?"

It was at this point, however, that the court committed error. Appellants argued that parties should not be able to rummage through someone's stack of documents to see if something is relevant. The court agreed and excluded said documents (p. 9, lines 10-21).

The error is that this is not rummaging through somebody's private stack of documents, but going through public files and documents to determine if there are documents that are relevant.

Once the court made the finding that the subject documents were not privileged, there is no reason to keep these documents from the public as they are part of a public record. The arguments above as to why the appeal should be denied at the same time mandates that the cross appeal must be granted, and that these five documents must be revealed.

Respondent and cross appellant, herein, is not going to further burden the court by repeating in detail the arguments set forth above. In summation, public policy allows public access to files for this purpose. The record is barren as to any arguments as to how these documents could injure the privacy of any "living" person, or even the deceased, L. Ron Hubbard.

Further, Judge Geernaert accurately stated the reason for such public access when he asked the question as to how relevance can be determined unless the documents are examined.

The "without prejudice" in the minute order (App. Q) is

explained in the transcript. (TR 21-35; App. Y). Judge Geernaert stated that to the extent that any proper discovery requests are made "the Church" will be required to so indicate, in which case you can make a motion to have it unsealed (TR 29, lines 13-21; App. Y, p. 9, lines 13-21). In response, respondent argued that we should be able to at least examine the documents so that we could make motions showing how they are relevant and possibly even obtain a court order in the other litigation for discovery of the same. The court refused the suggestion. (TR 31; App. Y, p. 11, lines 4-19), despite the fact that it was pointed out that such efforts would be futile as the plaintiffs in two defamation actions (footnote 2) are Scientologists, not the Church of Scientology, and such discovery request could not be made upon them. And while the court pointed out that one can do discovery on a non-party, this court cannot make such non-parties produce documents contained in the court file under seal. Lastly, such expense should not be forced upon Respondent, when he has the right to examine a public file.

And, further, Respondent would be left to guess as to the context of the five documents in order to even claim such discovery request.

At the very least, the cross-appellant should be allowed to review the documents so that arguments can be made as to relevancy. Or, in the alternative, the documents should be transmitted to the courts where the other actions are pending

for said courts to make their own determination. We note that in Zolin v. United States, 809 F.2d 1411, such procedure appeared to be followed. Certain documents were ruled irrelevant and others were ruled relevant.

The procedure designed by Judge Geernaert is both unlawful, as public documents are open to public inspection, and non-workable, as it is impractical to try to force non-party Scientology to disclose identity of relevant documents in other actions. It is further costly, particularly in light of Scientology's litigious history.

Therefore it is respectfully submitted that the five designated documents should be unsealed, or, in the alternative, either be given to Respondent alone, or Respondent should be allowed to inspect the same for purposes of making an argument as to relevance, or same should be transferred to courts where the other actions are pending for determination.

As to the 500 series (audio tapes), United States Supreme Court has now rendered a decision concerning the same, remanding for a hearing to determine their discoverability. United States v. Zolin, 109 S. Ct. 2619. We ask that this court remand as to the issue to the trial court with instruction to follow the guidelines stated by United States Supreme Court in Zolin.

Date: 12/19/89

TOBY L. PLEVIN

Date: 12/19/89

PAUL MORANTZ